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No. 80-294

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

MERLE O. GREENE, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LAWRENCE TAYLOR
10880 Wilshire Boulevard
Suite 1900
Los Angeles, California 90024
(213) 475-2568

Attorney for Petitioner

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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

May a prosecutor systematically exclude all members of one race from jury duty through the exercise of peremptory challenges?

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Petitioner Merle O. Greene, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 1, 1980, affirming the United States District Court's denial of his motion to vacate judgment.

OPINION BELOW

Petitioner was convicted by a jury in the United States District Court of Missouri, Western Division. He moved to vacate the judgment pursuant to 28 U.S.C. 2255; this motion was denied by the District Court. Petitioner then appealed the denial to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the denial. No petition for rehearing was filed.

The opinion of the Court of Appeals is not yet reported. It is reproduced in full in Appendix "A" herein.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1253(1). The judgment of the Court of Appeals was entered on August 1, 1980 (App. A, infra). Petitioner filed a notice of appeal on August 11, 1980.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

Sixth Amendment to the Constitution of the United States:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner was charged by indictment in four counts with falsely testifying before a magistrate for the Western District of Missouri in a hearing to determine if he had violated the conditions of bail on another matter.

Petitioner demanded a jury trial. At trial, the Assistant United States Attorney exercised six peremptory challenges against veniremen during jury selection; five of these -- the first five -- were against the only members of the black race on the jury panel. As a result, Petitioner -- a black man -- was tried by an all-white jury. He was found guilty of counts 1, 2 and 3, and not guilty of count 4. He was sentenced on count 2 to one year in the custody of the Attorney General, and was fined $1000; imposition of sentence was suspended on counts 1 and 3.

On appeal to the United States Court of Appeal for the Eighth Circuit from that conviction, the judgments as to counts 1 and 3 were reversed, and affirmed as to count 2 (February 1, 1979: No. 79-1336). Petitioner concluded his period in custody, and is presently on probation to the U.S. Probation and Parole System in Los Angeles, California.

Representing himself, Petitioner filed a Motion to Vacate Judgment (28 U.S.C. 2255) with the United States District Court for the Western District of Missouri, Western Division (Civil No. 80-0162 - CV - W), together with supporting affidavits, alleging as his sole grounds the fact that all members of the negro race were systematically excluded by the federal prosecutor from the jury that tried the case. The stated grounds of the motion had not been raised in the original appeal from the conviction; Petitioner had not previously filed any other motions to vacate judgment or writs of habeas corpus. On March 12, 1980, the District Court, the Honorable Bruce Van Sickle, Judge, denied the motion.

Still representing himself, Petitioner filed a timely Notice of Appeal on March 24, 1980.

Petitioner then filed a Motion to Supplement the Trial Record, together with supporting affidavits from witnesses, on March 31, 1980, requesting that the record reflect that: (1) Petitioner was a member of the negro race; (2) no member of the negro race sat on the jury; and (3) the federal prosecutor in the trial had exercised (six) peremptory challenges -- the first five of which were exercised against the only members of the negro race present on the jury panel. On June 27, 1980, the District Court granted this motion.

On August 1, 1980, the Court of Appeals for the Eighth Circuit affirmed the District Court's denial of Petitioner's Motion to Vacate Judgment on the grounds that discriminatory conduct by a federal prosecutor "cannot be established by merely showing that the prosecutor struck all of the black persons on any particular jury panel," citing Swain v. Alabama (1965) 380 U.S. 202.

REASONS FOR GRANTING THE WRIT

The systematic exclusion of all members of the negro race from the jury by the federal prosecutor constituted a denial of Petitioner's right to a fair trial by an impartial jury and to due process and equal protection of the laws

The Assistant United States Attorney successfully engaged in the systematic exclusion of all black persons from the jury that tried Petitioner in the trial below. Of the six "strikes," or peremptory challenges, exercised by the prosecutor against the veniremen, the first five were used against members of the negro race -- the only five blacks on the jury panel.

Petitioner is, of course, a member of the negro race.

At the outset, existing law established in Swain v. Alabama (1965) 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824, must be recognized. In that case, this Court clearly stated that "we

cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U.S. 221. The basis for this holding, this Court went on to say, was that "it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged." 380 U.S. 223. In other words, this Court was granting a presumption that the prosecutor in question was "acting on acceptable considerations" -- i.e., not acting illegally or in violation of a defendant's constitutional rights, such as excluding veniremen on the basis of race. It is, then, only a presumption -- not an absolute right to exercise peremptory challenges without limitation. That this presumption was a rebuttable one was made clear by this Court:

> "If the State has not seen fit to leave a single Negro in any jury in a criminal case, the Presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify." 380 U.S. 224.

It seems clear, therefore, that this Court has cloaked the prosecutor with a presumption of good intentions in the exercise of his jury challenges -- but a presumption which can be overcome by clear facts. Certainly, the facts in Petitioner's case could not be clearer: of 28 veniremen, 5 were black -- and these 5 were the first to be excused by the Assistant U.S. Attorney, who exercised only one other challenge after the 5 blacks were gone. The mathematical odds against this happening by chance are, of course, astronomical. Without question, the prosecutor was concerned with only one thing in selecting a jury to try the Petitioner, a black man: ensuring that no blacks were sworn as jurors. And none were.

Even under the Swain ruling, therefore, the Assistant U.S. Attorney's conduct at the trial herein must be condemned. As a result of his racial exclusionary policy, Petitioner was prevented from having a fair trial before an impartial jury, was denied due process of law, and was refused the equal protection of the laws.

That the exclusion of all backs from the jury that tried Petitioner was not an isolated instance in the United States District Court for the Western District of Missouri was tacitly recognized by the Court of Appeals in its opinion below (see App. A):

> "This court is well aware that on several previous occasions black defendants have attacked the conduct of the prosecutor's office in the Western District of Missouri

in exercising peremptory challenges against prospective black jurors. We have characterized these attacks as raising serious questions. (citations). In Nelson (United States v. Nelson (8th Cir. 1976) 529 F.2d 40, cert. den. 426 U.S. 922) we made the following pertiment comment:

> "'Should the prosecutors' practices, as revealed here and in Carter (United States v. Carter (8th Cir. 1975) 528 F.2d 844) continue, we are sure that the district judges in the Western District of Missouri will take appropriate action. . . .'"

Obviously, the district court judge failed to "take appropriate action" in Petitioner's trial.

It is, perhaps, illuminative to view the issue in historical perspective. At one point in our nation's history, it was permissible for a state to enact statutes denying members of the black race the right to sit on a jury. This was, of course, finally struck down in 1879 by this Court.

> "(H)ow can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" Stauder v.

West Virginia (1879) 100 U.S. 303, 309, 25 L.Ed.2d 664.

Nevertheless, there still existed two means of preventing blacks from taking part in the judicial system: they could still be excluded from sitting on a grand jury, and they could be struck from petit juries through the use of peremptory challenges.

Exclusion of blacks from grand juries was the next racially discriminatory practice to fall. In Smith v. Texas (1940) 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84, this Court condemned the de facto exclusion of blacks. Although there was no law precluding blacks from serving on grand juries, the results of procedures followed by authorities clearly indicate an exclusionary intent.

> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. . . . If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." 311 U.S. 131-32.

There now remained but one last bastion for the prosecutor desirous of excluding all members of a race from serving on a jury: the peremptory challenge.

The Court in Swain dealt initially with this problem, choosing to cloak the prosecutor with a

charitable presumption -- but specifically holding that the presumption was rebuttable upon a showing, as in Smith, of discrimination in fact. This still left a heavy burden on a defendant to legally prove what is factually obvious.

Then, the Supreme Court of the State of California -- long known to be in the vanguard of constitutional scholarship -- chose to deal with the problem directly. In its now-famous decision in People v. Wheeler (1978) 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 784, that Court specifically prohibited a prosecutor from engaging in the systematic elimination of jurors on racial grounds through the use of the peremptory challenge.

> "We conclude that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community. . . ." 22 Cal. 3d 276-77.

The Court then went on to address the problem of proving the intent behind the exercise of peremptory challenges:

> "(T)he party may show that his opponent has struck most or all of the members of the identical group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic -- their membership in the group . . . ." 22 Cal. 3d 280.

The Court then went on to find that, in the case at bar, the prosecutor had exercised peremptory challenges against blacks on the ground of racial bias, and that the error was prejudicial per se -- requiring reversal.

In an interesting discussion of Swain, the California Supreme Court commented that the burden of proof imposed upon a wronged defendant by that decision was practically impossible to meet, and that "in the 10 years since Swain in all of the cases involving this issue thus far, all of which have dealt with blacks as the group peremptorily challenged, no defendant has yet been successful in proving to the court's satisfaction an invidious discrimination by the use of the peremptory challenge against blacks over a period of time." 22 Cal. 3d 286.

> "It demeans the Constitution to declare a fundamental right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right. For the reasons stated, the rule of Swain v. Alabama is not to be followed in our courts. . . ." 22 Cal. 3d 287.

The Supreme Judicial Court of Massachusetts soon followed the California lead. Drawing heavily on the California decision, that Court reversed a conviction wherein the prosecutor had peremptorily challenged 12 out of 13 black veniremen. Commonwealth v. Soares (1979) 387 N. E. 2d 499.

Of course, the California and Massachusetts Supreme Court decisions are not legally applicable to the Court herein. Nevertheless, Wheeler and Soares represent the clear and inevitable culmination of a line of constitutional authority that began with striking down laws prohibiting blacks from sitting as jurors; and has now reached the last stronghold of those striving to achieve the same results through another method: the peremptory challenge.

It should be noted that Swain was decided in 1965. Since then, the Sixth Amendment has been held applicable to the states. Duncan v. Louisiana (1968) 391 U.S. 145. Similarly, the requirement that in criminal trials a jury venire must be drawn from a fair cross-section of the community has been applied since Swain. Taylor v. Louisiana (1975) 419 U.S. 522. In view of these more recent decisions, it is probable that were the issues in Swain addressed today, a considerably easier burden of proof would be placed upon a defendant to show discriminatory exclusion.

Of particular note is the fact that Swain was decided upon strictly equal protection grounds -- not upon due process concepts. Addressing the Swain - Wheeler conflict, at least one scholar has recently suggested that the Sixth Amendment's mandates, applicable to the states since Swain, require an easier burden on the defendant in accordance with his rights of due process:

> "The theoretical inconsistencies and the practical problems posed can be resolved only by founding the defendant's

> right to object to the prosecutor's misuse of the peremptory challenge on the policies of jury selection implicated in the sixth amendment. This solution should result in satisfaction of the defendant's rights and in a verdict which a just community can adopt as its own." 92 Harvard L.R. 1770, 1789 (June 1979).

There is no constitutional right to exercise peremptory challenges -- but there is such a right to a fair trial by a jury of peers. The peremptory challenge is a technical, statutory right; fair trial and equal protection are among the most fundamental of constitutional rights. It would seem obvious that in a clash between these "rights," the long-sanctified peremptory challenge must give way.

Over one hundred years ago the Court prohibited the states from precluding blacks from sitting on juries. Yet, today the federal courts themselves continue to permit this racially discriminatory practice -- in the form of the peremptory challenge. The end result is the same: criminal juries continue to be all-white when the prosecution so desires -- a fact well known to every competent trial lawyer.

For too long, blacks have been discriminatorily excluded from serving as jurors on criminal cases. Swain took the first step in removing the final obstacle, by at least permitting a defendant to show that the challenges were part of an exclusionary pattern. Wheeler and Soares took the final step,

offering California and Massachusetts citizens a practically attainable means of proving that exclusionary pattern. It perhaps remains for the federal courts to join in achieving that final step.

> Petitioner's failure to object on the record should not be a bar to raising the issue herein, nor should his failure to raise the issue in his direct appeal from the conviction

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The jury selection procedure utilized by the trial court was simply not recorded by the court reporter. The process of "striking," or exercising peremptory challenges, was therefore not reported. As a result, there is absolutely no official record of the procedure -- other than the bare listing of the jurors' names in the Clerk's Transcript. Most importantly, there is no record of the racial character of the veniremen, or even of the Petitioner himself. There is only the granting of Petitioner's motion to supplement the record.

Because there is no record of the procedures, this Court has no showing that Petitioner ever objected to the racially discriminatory methods of jury selection used by the Assistant U.S. Attorney. Nevertheless, Rule 52(b) of the Federal Rules of Criminal Procedure clearly states:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention

of the court."

As Justice Stone once stated in setting forth his now-familiar principle in 1936:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." U.S. v. Atkinson (1936) 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555.

Certainly, the error was "obvious" in the trial below: the first five strikes exercised by the Assistant U.S. Attorney were against the only blacks on the jury panel. And just as certainly, the systematic exclusion of all members of a given race from jury duty must "seriously affect the fairness, integrity, or public reputation of judicial proceedings."

Counsel for Petitioner at trial may be excused from having insisted on a formal objection to the procedures being lodged on some record somewhere. As he was well aware, the prevailing law at the time (Swain, Nelson, et al.) permitted such racial exclusion.

Petitioner also failed to raise the issue on his direct appeal from the conviction -- an appeal that resulted in the reversal of two of the three counts of which he was convicted. The same

counsel again apparently felt such an argument would be futile in view of Swain -- understandably. But most importantly, the issue could not be raised on direct appeal if there was simply no trial record to reflect the claimed error: counsel was limited to issues raised by facts reflected in the record below.

As this very Court has clearly stated:

> "Those matters amounting to a denial of a fair trial, if proved, which could not have been raised upon appeal, or which constitute a denial or infringement of a constitutional right if not asserted upon direct appeal, even though they might have been, are generally cognizable under Section 2255. See, e.g., Kaufman v. United States, 394 U.S. 217, 230-231, 89 S.Ct. 1068, L.Ed.2d 227 (1969); (additional cites). . . ." Houser v. United States (C.A. Mo. 1974) 508 F.2d 509.

And it has been specifically held that a motion pursuant to 28 U.S.C. Sec. 2255 will be permitted where the issue raises matters not found in the trial record; the petitioner is entitled to produce the missing evidence at a hearing on the motion to vacate. DiAngelo v. U.S. (1976) 406 F.Supp. 880, aff. 566 F.2d 1168. Of course, in the instant case the District Court granted Petitioner's subsequent motion to supplement the trial record on appeal.

In any event, the general rule that technical rules of procedure should not operate to deny substantial constitutional rights should apply in this case. In applying Section 2255, "(T)he technical rules of procedure should be liberally construed so as to protect the prisoner's rights . . . ." Adam v. U.S. (C.A. Okla. 1960) 274 F. 2d 880; accord, Sullivan v. U.S. (D.C. NY 1961) 198 F.Supp. 624.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the United States Court of Appeals for the Eighth Circuit entered herein.

Dated: August 25, 1980

Respectfully submitted,

LAWRENCE TAYLOR

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1474

United States of America, Appellee,	*	Appeal from the United States
v.	*	District Court for
Merle O. Greene, Jr., Appellant.	*	the Western District of Missouri.

Submitted: July 24, 1980

Filed: August 1, 1980

Before LAY, Chief Judge; BRIGHT and HENLEY, Circuit Judges.

PER CURIAM.

Merle O. Greene, Jr. appeals pro se from an order of the district court denying his petition to vacate sentence under 28 U.S.C. § 2255. Greene's petition claimed that the prosecutor, by exercising peremptory challenges aginst all black persons on the prospective jury panel,

deprived him as a black person of due process and equal protection of the laws. The district court denied relief and Greene appeals.[1] We affirm.

The issue raised by Greene is an important one in the administration of justice. The record, consisting of affidavits presented to the district judge in the section 2255 proceeding, shows that a panel of twenty-eight veniremen were present in the courtroom as prospective jurors for the trial, five of whom were black; that sixteen were excused through peremptory challenges; and that the Assistant United States Attorney, Mr. Kenneth Josephson, as prosecutor, struck six of those prospective jurors including all five black persons. As a result, no black person served on the jury.

This record will not justify relief. Although a federal prosecutor may not, through the use of peremptory challenges, systematically and intentionally bar black persons from serving on juries in criminal trials, such discriminatory conduct cannot be established by merely showing that the prosecutor struck all of the black persons on any particular jury panel. See Swain v. Alabama, 380 U.S. 202 (1965); United States v. Nelson,

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[1]Petitioner had been convicted of making a false declaration in violation of 18 U.S.C.A. § 1623 (West Supp. 1980). We affirmed his conviction on one count, reversing the conviction on two other counts. United States v. Greene, 591 F.2d 471 (8th Cir. 1979).

529 F.2d 40 (8th Cir.), cert. denied, 426 U.S. 922 (1976), and cases cited therein.

On this appeal, the record shows no more than that the prosecutor in this case struck six jurors, five of whom were black. The record does not reveal whether the prosecutor made these strikes for a permissible or an impermissible reason. The prosecutor's conduct ordinarily will be presumed proper. United States v. Nelson, supra, 529 F.2d at 43.

This court is well aware that on several previous occasions black defendants have attacked the conduct of the prosecutor's office in the Western District of Missouri in exercising peremptory challenges against prospective black jurors.[2] We have characterized these attacks as raising serious questions. United States v. Nelson, supra, 529 F.2d at 43; United States v. Carter, 528 F.2d 844, 850 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976). In Nelson we made the following pertinent comment:

> Should the prosecutors' practices, as revealed here and in Carter, continue, we are sure that the district judges in the Western District of Missouri will take appropriate action. We believe

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[2] Morgan v. United States, 564 F.2d 803 (8th Cir. 1977); United States v. Aaron, 553 F.2d 43 (8th Cir. 1977); United States v. Nelson, supra; United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976).

> trial judges in the exercise of their supervisory powers over the trial of criminal cases possess the power to require the prosecutor to discharge his duties in a fair, even, and constitutional manner, and thus ensure that no potential juror is denied the privilege of serving upon a jury solely because of his race. [United States v. Nelson, supra, 529 F.2d at 43 (citation omitted).]

The comment emphasizes that an attack on the jury selection process should be addressed to the trial judge before or during the trial. The trial judge possesses adequate power to take action to correct any constitutional or other deficiency in the jury selection process. We do not here decide that section 2255 provides no avenue of relief for a convicted defendant. We observe only that this procedure is an unlikely route because of the nature of the proof required to show a constitutional violation and, as already noted, because that proof ordinarily should be brought to the attention of the trial judge who can, in a proper case, provide an adequate and timely remedy.

Because the appellant in this case failed in his proof of an alleged constitutional violation, we affirm the denial of his section 2255 petition.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.